A

UNITED OVERSEAS BANK LTD v. UNITED SECURITIES SDN BHD (IN LIQUIDATION) & ORS

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
RAVINTHRAN PARAMAGURU JCA
B SEE MEE CHUN JCA
[CIVIL APPEAL NO: W-02(IM)(NCC)-1541-10-2020]
3 AUGUST 2021

C ***CIVIL PROCEDURE:*** *Forum conveniens – Proper forum for legal action – Non-exclusive jurisdiction clause in agreement – Whether irrevocable waiver that venue selected not convenient forum – Whether omission of option to sue elsewhere intentional – Whether parties obligated to refer to agreed jurisdiction – Whether submission to jurisdiction selected should not be challenged – Whether selected jurisdiction best positioned to hear dispute*

D This was an appeal by the appellant, United Overseas Bank Limited Singapore ('UOB'), against the decision of the High Court Judge ('HCJ'), dismissing its application for a stay of the High Court proceedings ('USSB suit') filed by the first respondent ('USSB') pending the final disposal of an originating summons filed by UOB in Singapore ('Singapore OS'). The stay E proceedings was premised on O. 12 r. 10(2) of the Rules of Court 2012 ('ROC') on the ground that Malaysia was not the proper forum for the dispute; rather, it was Singapore. Pursuant to a loan agreement ('loan agreement'), UOB granted a loan of USD18,700,000,00 ('loan') to USSB, secured by a deed of debenture by USSB, charging all of its assets to UOB, F including all of USSB's 2,500,000 ordinary shares in CCSB, then known as City Centre Bhd ('CCSB shares'). The CCSB shares were registered in UOB Nominees as required under the debenture. When USSB defaulted in repayment of the loan, UOB exercised its rights under the debenture and appointed receivers over the charged assets of USSB. USSB was subsequently G wound up. CCSB too was wound up and its lands were sold by the liquidators. There was a liquidation surplus of RM434 million ('surplus proceeds'). The CCSB liquidators filed an application for directions under s. 237(3) of the Companies Act 1965 on the distribution of the surplus proceeds, namely whether UOB Nominees was the sole contributory of CCSB and, if affirmative, whether the surplus proceeds may be forwarded to H it to apply the surplus based on the legal entitlement under the relevant security documents. The respondents to the application for directions were UOB Nominees, USSB and Equiticorp. It was to be noted that USSB and Equiticorp were then the unsecured creditors of CCSB and the debts had been fully paid by the CCSB liquidators. The High Court directed the surplus I proceeds to be paid to UOB Nominees. On appeal, the Court of Appeal allowed the appeal by USSB and Equiticorp. However, leave to the Federal Court was refused. USSB thus filed this suit, essentially, for declarations that

the surplus assets did not form part of the assets of USSB subject to the loan agreement and/or the debenture; UOB and/or UOB Nominees had not established a legal entitlement to the surplus proceeds, UOB Nominees was not a contributory of CCSB such as to be eligible to receive the surplus proceeds without establishing a legal entitlement to the same and other consequential relief. UOB filed its Singapore OS essentially seeking orders and/or reliefs that, under Singapore law, all of UOB's rights under the debenture were valid and exercisable including its security over all rights attached to the shares of CCSB; and, under the Singapore law, UOB's security over all rights attached to the shares of CCSB pursuant to the debenture includes security over the right to the surplus proceeds. Hence, the stay application by UOB. The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts.

Held (allowing appeal)
Per See Mee Chun JCA delivering the judgment of the court:

(1) The non-exclusive jurisdiction clause meant that only UOB had the option to refer to other jurisdictions but not USSB. Such an interpretation was fortified by cl. 25.6 of the loan agreement wherein, if UOB had selected Singapore as the forum, USSB irrevocably waived any claim that the venue so selected was not a convenient forum. Further, UOB had the option to sue elsewhere but not USSB. Such an option was intentionally omitted from USSB which entailed it being obligated to refer to the Singapore courts. This was further supported by the following reasons: (i) Singapore law is the governing law (cl. 25.1); (ii) USSB irrevocably and unconditionally submitted to the non-exclusive jurisdiction of the Singapore courts (cl. 25.2(a)); (iii) USSB irrevocably appointed a Singapore based firm as its agent to receive service of process in Singapore (cl. 25.2(b)); (iv) USSB agreed that a Singapore judgment shall be conclusive and binding upon it of the facts and the amount of indebtedness (cl. 25.2(c)); (v) USSB agreed that the right of UOB to bring any proceedings relating to the loan agreement and the debenture in any court elsewhere was not limited by cl. 25 (cl. 25.5); and (vi) USSB agreed that if UOB were to select the Singapore courts as the forum, it would irrevocably waive any objections on the ground that the Singapore courts were *forum non-conveniens* (cl. 25.6). (paras 22, 25 & 26)

(2) Clause 25, being an exclusive jurisdiction clause and the waiver of objection to Singapore as the proper forum to hear any dispute would, for all intent and purpose, make it clear that, as a matter of contractual obligation, the submission to the jurisdiction of the Singapore courts should not be challenged. This court also considered that the Singapore courts, in applying the law of the contract which is the laws of Singapore, would be best positioned to hear the dispute. (para 39)

(3) Submission to jurisdiction must be by a clear and unequivocal consent. The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts in CCSB's winding-up proceedings through UOB Nominees. However, the application for directions filed by CCSB liquidators was served on UOB Nominees as a respondent following from which UOB Nominees was compelled to defend its right as the sole shareholder/contributory of CCSB to the surplus proceeds. The USSB suit and the CCSB winding up stood on different footing. In the winding-up and the application for directions, the issue of CCSB indebtedness and the distribution of the surplus proceeds to UOB Nominees was to be resolved. The USSB suit concerned USSB indebtedness to UOB *vis-à-vis* the loan agreement and the debenture. CCSB was not a party to the loan agreement and the debenture. In fact, in their defence to the USSB suit, CCSB and its liquidators had pleaded that they were nominal defendants. (paras 41, 42, 44 & 45)

(4) All the defendants in the USSB suit could not be said to be prejudiced by not being made parties to the Singapore OS. All the defendants did not have any objection to the stay application other than Equiticorp. Equiticorp was then an unsecured creditor of CCSB and the debts had been fully paid by the CCSB liquidators. The disputes in the Singapore OS and the USSB suit only concerned USSB and UOB and not the other defendants in the USSB suit as they were not parties to the loan agreement and the debenture. Hence, the stay could not possibly prejudice them, more so, due to the position taken by them. (paras 52-55)

(5) Even if the Singapore OS could not be enforced in Malaysia due to it being a non-monetary judgment, it could not negate the fact that the Singapore judgment could be recognised by the courts here due to the exclusive jurisdiction clause. This was particularly so where what was being sought in the OS were the same as that in the USSB suit. Clause 25.2(c) of the loan agreement provided that a final judgment of the Singapore court shall be conclusive and binding and shall be conclusive evidence of the fact and of the amount of USSB's indebtedness. (para 56)

Case(s) referred to:

Adams And Others v. Cape Industries Pic And Another [1990] 1 Ch 433 ***(refd)***
Continental Bank NA v. Aeakos Compania SA And Others [1994] 1 WLR 588 ***(refd)***
Deutsche Bank AG v. Sebastian Holdings Inc (No 2) [2011] 2 All ER (Comm) 245 ***(refd)***
Donohue v. Armco Inc And Others [2001] UKHL 64 ***(refd)***
Fiona Trust & Holding Corporation v. Privalov [2007] 4 All ER 951 ***(refd)***
Global Partners Fund Ltd v. Babcock & Brown Ltd [2010] NSWCA 196 ***(refd)***
Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors [2019] 7 CLJ 395 FC ***(refd)***
JP Morgan Securities Asia Private Ltd v. Malaysian Newsprint Industries Sdn Bhd [2001] 2 Lloyd's Rep 41 ***(refd)***
Rubin v. Eurofinance [2013] 1 All ER 521 ***(refd)***
Spiliada Maritime Corp v. Cansulex Ltd [1986] 3 All ER 843 ***(refd)***

Swiss Life AG v. Moses Kraus [2015] EWHC 2133 ***(refd)***
Vinmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd [2018] SGCA 65 ***(dist)***
World Triathlon Corporation v. SRS Sports Centre Sdn Bhd [2019] 1 CLJ 381 CA ***(refd)***

Legislation referred to:
Companies Act 1965 (repealed), s. 237(3)
Rules of Court 2012, O. 12 r. 10(2)

Other source(s) referred to:
Richard Fentiman, *When Non-Exclusive Means Exclusive*, The Cambridge Law Journal, Jul 1992, vol 51, No. 2, pp 234, 235

For the appellant & 2nd respondent - Yoong Sin Min, Poh Choo Hoe & Choy Kay Chun; M/s Shook Lin & Bok
For the 1st respondent - P Gananathan & Tan Li Chie; M/s Gananathan Loh
For the 3rd, 4th & 5th respondents - Hoi Jack S'ng & Chew Mei Yng; M/s Lee Hishammudin Allen & Glendhill
For the 6th respondent - Ng Sai Yeang & Teoh Chye Yi; M/s Raja, Darryl & Loh
For the 7th respondent - K Shanti Moganasundram & Liew Seong Yee; M/s Shearn Delamore & Co

[Editor's note: For the High Court judgment, please see United Securities Sdn Bhd v. United Overseas Bank Limited & Ors [2021] 1 LNS 823 (overruled).]

Reported by S Barathi

JUDGMENT

See Mee Chun JCA:

Introduction

[1] This is an appeal by the appellant, United Overseas Bank Limited Singapore (UOB) against the decision of the learned High Court Judge (HCJ). The HCJ had dismissed its application for a stay of the High Court proceedings (the USSB suit) filed by the first respondent (USSB) pending the final disposal of an originating summons filed by UOB in Singapore (Singapore OS).

[2] We had allowed the appeal and our reasons are as follows.

[3] The stay proceedings was premised on O. 12 r. 10(2) Rules of Court 2012 (RC 2012) on the ground that Malaysia is not the proper forum for the dispute, rather it is Singapore.

Parties

[4] The parties in the appeal will be referred to as follows:

(i) UOB (the appellant);

(ii) USSB (the first respondent);

(iii) UOB Nominees (the second respondent);

A (iv) CCSB (the third respondent) and its liquidators, the fourth and fifth respondents;

(v) USSB's receiver (the sixth respondent); and

(vi) Equiticorp (the seventh respondent).

B **Background Facts**

[5] Pursuant to a loan agreement dated 17 December 1982 (the loan agreement), UOB granted a loan to USSB in US Dollars 18,700,000,00 (the loan). The loan was disbursed in US Dollars and duly utilised. As security for the loan, USSB granted a deed of debenture dated 17 December C 1982 (the debenture) charging all of its assets to UOB. The assets included all of USSB's 2,500,000 ordinary shares in CCSB then known as City Centre Bhd (the CCSB shares). The CCSB shares were registered in UOB Nominees as required under the debenture.

D **[6]** USSB defaulted in repayment of the loan. On 3 May 1985, UOB exercised its rights under the debenture and appointed receivers over the charged assets of USSB. USSB was wound up on 30 January 2007.

[7] CCSB too was wound up on 25 April 2000. CCSB had 16 parcels of land (the CCSB lands) which were eventually sold for RM516,275,200 by E the liquidators. There was a liquidation surplus of RM434 million (surplus proceeds). On 18 September 2017, the CCSB liquidators filed an application for directions under s. 237(3) of the Companies Act 1965 on the distribution of the surplus proceeds, namely whether UOB Nominees was the sole contributory of CCSB and if affirmative whether the surplus proceeds may F be forwarded to it to apply the surplus based on the legal entitlement under the relevant security documents.

[8] The respondents to the application for directions were UOB Nominees, USSB and Equiticorp. It is to be noted that USSB and Equiticorp were then unsecured creditors of CCSB and it is not disputed the debts have G been fully paid by the CCSB liquidators.

[9] On 12 February 2018 the High Court directed the surplus proceeds to be paid to UOB Nominees. USSB and Equiticorp appealed to the Court of Appeal which allowed the appeal on 21 February 2019. Leave to appeal to the Federal Court was refused on 17 October 2019.

H **[10]** On 9 December 2019, this USSB suit was filed. It essentially sought declarations the surplus assets do not form part of the assets of USSB subject to the loan agreement and/or the debenture; UOB and/or UOB Nominees have not established a legal entitlement to the surplus proceeds, UOB Nominees was not a contributory of CCSB such as to be eligible to receive I the surplus proceeds without establishing a legal entitlement to the same and other consequential relief.

[11] On 21 April 2020 UOB filed its Singapore OS. It essentially sought orders and/or reliefs that under Singapore law all UOB's rights under the debenture are valid and exercisable including its security over all rights attached to the shares of City Centre Sdn Bhd; and under Singapore law UOB's security over all rights attached to the shares of City Centre Sdn Bhd pursuant to the debenture includes security over the right to the surplus proceeds.

[12] Then came the stay application by UOB.

Finding Of The High Court

[13] The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts. This was because it had participated in the winding-up proceedings of CCSB through UOB Nominees where the questions posed in the application for directions effectively relate to UOB's interest in the surplus proceeds.

[14] On the jurisdiction clause in cl. 25 of the loan agreement, the HCJ found it to be intended to be operative in an action commenced by UOB against USSB. Since it was USSB which had first commenced proceedings there was no issue of USSB breaching the jurisdiction clause. There was nothing in that clause imposing an obligation on USSB to pursue its action in relation to the loan agreement and the debenture against UOB in Singapore. It followed that the general law in respect of *forum non conveniens* would be applicable and the factors laid out in *Spiliada Maritime Corp v. Cansulex Ltd* [1986] 3 All ER 843 would be considered to determine the appropriate forum.

UOB's Submission

[15] It was submitted by UOB that the jurisdiction clause in the loan agreement expressly provides for the exclusive jurisdiction to determine the disputes between the parties and that would be Singapore as the *forum conveniens*. USSB was obliged to resort to the Singapore courts, including commencing the USSB suit in Singapore. It is USSB that bears the burden to show strong or exceptional reasons as to why the Malaysian courts should condone the breach by USSB in allowing it to continue with the USSB suit. As the burden was not discharged, the USSB suit ought to be stayed.

[16] Furthermore, there was no submission to the jurisdiction of the Malaysian courts where it had not participated in the winding-up proceedings of CCSB.

USSB's Submission

[17] It was submitted by USSB that the jurisdiction clause was non exclusive such that there had been no breach of such clause. Even if the jurisdiction clause could be treated as an exclusive clause, there was no meeting of minds in the present situation as per the HCJ finding. Given the

A non applicability of the jurisdiction clause by reason of UOB's submission to jurisdiction and that it did not apply to the USSB suit, it was UOB that had the burden to show that Singapore is the more appropriate forum. In actual fact, Malaysia is the more appropriate forum for the interests of all parties.

B

Our Decision

Whether Clause 25 An Exclusive Jurisdiction Clause

[18] We started by looking at the applicable law in the loan agreement and the debenture in relation to the dispute between UOB and USSB. In this C regard, the relevant clause is cl. 25 which is set out in part as below:

> 25.1 This Agreement and the Debenture shall be governed by and construed in all respects in accordance with the laws of Singapore.
>
> 25.2 The Borrower hereby irrevocably agrees that any legal action or proceedings against it with respect to this Agreement and the Debenture D may be brought in the courts of Singapore and the Borrower hereby:
>
> (a) irrevocably submits ... and unconditionally to the non exclusive jurisdiction of the aforesaid courts ...;
>
> (b) irrevocably appoints Khatter Wong & Partners ... as its agents to receive service of process in Singapore; E
>
> (c) ... agrees that a final judgment ... shall be conclusive and binding upon the Borrower ... shall be conclusive evidence of the fact and of the amount of the Borrower's indebtedness.
>
> 25.5 Nothing in this Clause shall limit the right of the Bank to bring any F proceedings with respect to this Agreement and the Security Documents against the Borrower in any court elsewhere.
>
> 25.6 The Borrower hereby irrevocably waives any objection which it may now or hereafter have to the venue of any suit, action or proceeding arising out of or relating to this Agreement and Security Documents selected by the Bank and hereby irrevocably waives any claim that the G venue so selected is not a convenient forum for any suit, action or proceeding.

[19] From cl. 25.1, it is clear that Singapore law applies to any dispute relating to the loan and debenture.

H **[20]** Moving on to the forum, the words in cl. 25.2 would point towards USSB submitting to the non-exclusive jurisdiction of the Singapore courts. However, the use of such phraseology does not mean the jurisdiction of the Singapore courts is necessarily non-exclusive. We were in agreement with the rationale behind a non-exclusive jurisdiction clause as explained by I Richard Fentiman in *When Non-Exclusive Means Exclusive,* The Cambridge Law Journal, Jul, 1992, Vol 51, No. 2 at pp. 234 and 235 as follows:

> In loan agreements, to take one example, jurisdiction clauses are drafted, from the lender's viewpoint, with two main aims in mind: first, to ensure that the borrower cannot challenge the jurisdiction of the lender's preferred forum; and secondly, to give the lender the maximum freedom to sue elsewhere as well, normally in pursuit of the borrower's assets ... An express submission to the non-exclusive jurisdiction of the English courts was usually adequate ... to secure English jurisdiction.
>
> Secondly, as long as the parties agree to English jurisdiction the language in which they express themselves is irrelevant. A non-exclusive jurisdiction agreement is still a jurisdiction agreement.
>
> If an agreement to English jurisdiction exists, it should not matter whether it is exclusive or non-exclusive in form, or simply undesignated.

[21] Case law too supports such an understanding. In *JP Morgan Securities Asia Private Ltd v. Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41 it was held at p. 45 as follows:

> 43. For the present purposes I see no difference between an exclusive and a non-exclusive jurisdiction clause. The difference between the two in principle is that, in the former case both parties are contractually bound to the chosen forum whereas in the latter case it is only the defendant who is so bound.

[22] Extrapolating the above two points, we were therefore inclined towards the interpretation that the non-exclusive jurisdiction clause meant that only UOB has the option to refer to other jurisdictions but not USSB. Such an interpretation is fortified by cl. 25.6 of the loan agreement where if UOB has selected Singapore as the forum, USSB irrevocably waives any claim that the venue so selected is not a convenient forum.

[23] In *Continental Bank NA v. Aeakos Compania SA And Others* [1994] 1 WLR 588, the English Court of Appeal had occasion to consider a jurisdiction clause similar to the instant appeal. That clause provided at pp. 591 and 592 as follows:

> 21.01 This agreement shall be governed by and construed in accordance with English law.
>
> 21.02 Each of the borrowers ... hereby irrevocably submits to the jurisdiction of the English courts and hereby irrevocably nominates Messrs, Aegis (London) Ltd of 197, Knightsbridge, London, SW7, England to receive service of proceedings in such courts on its behalf but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof.

At pp. 593 and 594 it was then stated:

> Does clause 21.02 contain an exclusive jurisdiction clause? Clause 21.02 does not expressly make clear that the jurisdiction agreement is an exclusive one, Dicey & Morris, *The Conflict of Laws*, 12th ed. (1993), vol.1,p.422, submits that the question is simply whether on its true construction the clause obliges the parties to resort to the relevant

A jurisdiction, irrespective of whether the word 'exclusive' is used ... In our judgment it would be as surrender to formalism to require a jurisdiction clause to provide in express terms that the chosen court is to be the exclusive forum.

...

B We regard the concluding words as significant: "but the bank reserves the right to proceed under this agreement in the courts of any other country claiming or having jurisdiction in respect thereof". The juxtaposition of a submission by the defendants to the jurisdiction of the English courts and the option reserved in favour of the bank to sue elsewhere brings into play the *expressio unius exclusio alterius* canon of construction. It suggests that a C similar option in favour of the defendants was deliberately omitted. In our judgment the language of clause 21.02 evinces a clear intention that the defendants, but not the bank, would be obliged to submit disputes in connection with the loan facility to the English courts.

D **[24]** This essentially meant that absent of the words "exclusive jurisdiction" did not necessarily mean the (English) courts did not have exclusive jurisdiction. This was because the juxtaposition of submission by the defendants to the jurisdiction of the English courts and the option to the bank to sue elsewhere suggested a similar option in favour of the defendants was intentionally omitted. This meant a clear intention that the defendants E but not the bank would be obliged to submit its dispute to the (English) courts.

[25] This would be the position in this instant appeal where UOB has the option to sue elsewhere but not USSB. This drives home the point that such an option was intentionally omitted from USSB which entailed it being F obligated to refer to the Singapore courts.

[26] The following reasons further support the above position. Singapore law is the governing law (cl. 25.1); USSB irrevocably and unconditionally submitted to the non-exclusive jurisdiction of the Singapore courts (cl. 25.2(a)); USSB irrevocably appointed a Singapore-based firm as its agent G to receive service of process in Singapore (cl. 25.2(b)); USSB agreed that a Singapore judgment shall be conclusive and binding upon it of the facts and the amount of indebtedness (cl. 25.2(c)); USSB agreed that the right of UOB to bring any proceedings relating to the loan agreement and the debenture in any court elsewhere was not limited by cl. 25 (cl. 25.5); and USSB agreed H that if UOB were to select the Singapore courts as the forum, it would irrevocably waive any objections on the ground that the Singapore courts are *forum non conveniens* (cl. 25.6).

[27] In *Deutsche Bank AG v. Sebastian Holdings Inc (No 2)* [2011] 2 All ER (Comm) 245 it was stated at p. 256 that "in construing a jurisdiction clause, I a broad and purposive approach must be followed".

[28] The Australian Court of Appeal in *Global Partners Fund Ltd v. Babcock & Brown Ltd* [2010] NSWCA 196 had this to say:

> [67] A significant purpose of an exclusive jurisdiction clause is to ensure that all disputes are determined in a coherent manner by a single jurisdiction. There is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, with the consequent prospect of divergent findings. Furthermore, the parties, in advance, have determined that a particular jurisdiction is acceptable to them, both in terms of the speed and efficacy of its civil dispute resolution procedures and for the competence and skill of its judges and lawyers. A party to such a clause should be held to its contractual obligations, whether enforced by another party on a contractual basis or by means of the exercise of a discretion conferred upon the court.

[29] Refer also to *Fiona Trust & Holding Corporation v. Privalov* [2007] 4 All ER 951 at 962 where the sensible commercial presumption is that parties did not intend the inconvenience of having possible disputes from their transaction being heard in two places.

[30] Under these circumstances, the HCJ was wrong to conclude that "UOB's reliance on the exclusive jurisdiction clause is misplaced as the exclusive jurisdiction clause does not concern an action commenced by USSB against UOB. The exclusive jurisdiction clause has no force in a situation where USSB sues UOB Singapore as there is nothing to indicate the meeting of minds of the parties in respect of such a situation" (para. 80 of grounds). The meeting of the minds arises from the juxtaposition of submission by USSB to the jurisdiction of the Singapore courts and the option to UOB to sue elsewhere which suggested a clear intention that USSB but not UOB would be obliged to submit its dispute to the Singapore courts, as per Continental Bank NA.

[31] In para. 81 the HCJ went on to state that an exclusive jurisdiction clause may still be incorporated if UOB can show there is a good arguable case that such an agreement exists between parties. *Vinmar Overseas (Singapore) Pte Ltd v. PTT International Trading Pte Ltd* [2018] SGCA 65 was referred to as an illustration. The reference to *Vinmar* can be distinguished where in that main contract, there was no exclusive jurisdiction clause unlike in this instant where we have found cl. 25 to be an exclusive jurisdiction clause.

[32] There being an exclusive jurisdiction clause, it is USSB that bears the burden to show strong reasons why it ought to be allowed to continue with the USSB suit. There is no necessity to go the route of *Spiliada* on *forum conveniens*.

[33] This was what was said by the English House of Lords in *Donohue v. Armco Inc And Others* [2001] UKHL 64 at p. 759:

A [24] If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-
B contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in the forum... the general rule is clear; where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that
C obligation in the absence of strong reasons for departing from it.

[34] *Donohue* was followed by the Federal Court in *Jaya Sudhir Jayaram v. Nautical Supreme Sdn Bhd & Ors* [2019] 7 CLJ 395; [2019] 5 MLJ 1. At p. 425 (CLJ); p. 25 (MLJ) it was stated:

D [52] Stating the matter very generally, in an application for injunction to restrain or stay arbitration proceedings, or for an anti-suit injunction which has the effect of preventing a party from bringing a claim in any forum other than the forum parties agree to submit, strong reasons are required to displace the contractual obligation entered into in relation to an arbitration clause or an exclusive jurisdiction clause. Suffice if we refer to
E one leading English authority in support of this proposition. The decision of the House of Lords in the case of *Donohue v. Armco Inc And Others* [2002] 1 All ER (Comm) 97 bears out exactly the logical basis for the above proposition in the following passages ...

[35] Similarly in *World Triathlon Corporation v. SRS Sports Centre Sdn Bhd*
F [2019] 1 CLJ 381, the Court of Appeal had this to say at p. 389:

[19] In the present appeal, just like the *American Express* case, the parties here had agreed to a foreign jurisdiction clause as well as to be governed not by the laws of Malaysia but by the laws of Florida/USA. Now, the law in relation to the exclusive jurisdiction or forum selection clause is not
G controversial. Although generally a forum selection clause does not oust the jurisdiction of the court, the court is nevertheless obliged to give effect to it as that is what the parties had agreed (see *Globus Shipping & Trading Co (Pte) Ltd v. Taiping Textiles Berhad* [1976] 1 LNS 31; [1976] 2 MLJ 154). Disregarding such a clause would effectively mean the courts condoning a breach of the agreement.

H **[36]** In essence, the above cases would show the need to give effect to an exclusive jurisdiction clause and that to depart from it would be to condone the breach of an obligation such that USSB is required to show strong reasons for departing from it.

I **[37]** *World Triathlon Corporation* at p. 390 had also stated that:

[23] In our view, these considerations accepted by the learned judge are insufficient to override the exclusive jurisdiction clause. More is required as the parties had willingly and contractually agreed to the exclusive

jurisdiction clause as well as the laws of Florida/USA as the law of choice for the litigation. The respondent must show more than just inconvenience to witnesses and cost of litigation. Practical inconvenience is not a determinative factor. What matters most is the suitability of the forum which will meet the ends of justice.

[25] In any case, having agreed to submit to the jurisdiction of the Courts of Florida/USA, it is not open to the respondent to now complain about inconvenience and cost as these were also matters which could have been foreseen at the time of entering into the agreement.

[38] Thus the factors in *Spiliada* do not amount to strong reasons in the face of an exclusive jurisdiction clause.

[39] Clause 25 being an exclusive jurisdiction clause and the waiver of objection to Singapore as the proper forum to hear any dispute would for all intent and purpose make it clear that as a matter of contractual obligation, the submission to the jurisdiction of the Singapore courts should not be challenged. We also considered that the Singapore courts in applying the law of the contract which is the laws of Singapore would be best positioned to hear the dispute.

[40] To wrap up on this issue, reference again is made to *World Triathlon Corporation* at p. 389:

So, to surmise, where there is an exclusive jurisdiction clause, effect should be given to it and a stay ought to be granted, unless the party challenging the exclusive jurisdiction clause is able to show exceptional circumstances amounting to a strong cause warranting a refusal. The burden is on the party challenging the exclusive jurisdiction clause to show why they should not be bound to honour the part of the contract where they had agreed to jurisdiction.

Whether UOB Submitted To The Malaysian Courts Jurisdiction Through UOB Nominees

[41] The HCJ found that UOB had submitted to the jurisdiction of the Malaysian courts in CCSB's winding-up proceedings through UOB Nominees.

[42] We note however that the application for directions filed by CCSB liquidators was served on UOB Nominees as a respondent following from which UOB Nominees was compelled to defend its right, as the sole shareholder/contributory of CCSB, to the surplus proceeds. The affidavit filed by the Senior Vice President UOB was in the context of UOB Nominees' opposition to USSB's application to stay the High Court directions that the surplus proceeds be paid to UOB Nominees and nothing more. Even if UOB Nominees had transferred the RM240 million it received to UOB, this did not amount to UOB having participated in CCSB's winding-up proceedings through UOB Nominees.

[43] The Court of Appeal in the application for directions had considered too that UOB was not a party to the proceedings. In para. 100 of its grounds it stated that certain observations were made without the benefit of certain parties before them especially UOB.

[44] The USSB suit and the CCSB winding up stand on different footing. In the winding up and the application for directions, the issue of CCSB indebtedness and the distribution of the surplus proceeds to UOB Nominees is to be resolved. The USSB suit concerns USSB indebtedness to UOB *vis a vis* the loan agreement and the debenture. It cannot be gainsaid that CCSB is not a party to the loan agreement and the debenture. In fact, CCSB and its liquidators have pleaded in their defence to the USSB suit they are nominal defendants.

[45] Further, submission to jurisdiction must be by a clear and unequivocal consent. *Adams And Others v. Cape Industries Pic And Another* [1990] 1 Ch 433 is authority for such proposition. This was a case when a consent order was recorded and subsequently another group of workers sued on the same cause of action. In the second suit, Cape Industries did not defend the action on the basis of the American courts having no jurisdiction. Default judgment was obtained. Proceedings were commenced in England to enforce the default judgment and the objection by Cape Industries was it did not submit to American jurisdiction in the second suit. At p. 462 the Court of Appeal there stated:

> ... Where steps taken in proceedings are being examined in the context of an alleged submission to the jurisdiction, what is being sought is evidence of consent on the part of defendant to the exercise by the court of jurisdiction over him ... .

[46] *Rubin v. Eurofinance* [2013] 1 All ER 521 referred to by USSB was an instance where proof of debt, participation in creditors meeting and receipt of dividends were held to be submission to jurisdiction. Quite apart from it concerning internal insolvency proceedings as opposed to civil proceedings in the form of the USSB suit and the Singapore suit, there was never any proof of debt filed by UOB in the winding-up proceedings.

[47] The reliance on *Swiss Life AG v. Moses Kraus* [2015] EWHC 2133 that the submission to jurisdiction extends to related matters must be viewed in the light of *Adams* where there must be evidence of consent even when the two causes of action were the same.

Grounds Of The Court Of Appeal Dated 7 August 2019

[48] These grounds were in relation to the application for directions filed by the CCSB liquidators on the distribution of the surplus proceeds.

[49] As noted earlier, UOB was not a party to those proceedings and the USSB suit and the CCSB winding up stand on different footing. It follows therefore that those grounds cannot have any effect on the USSB suit. In fact,

in para. 91 of the grounds it was stated that "these matters ought to be dealt with in or through separate proceedings, initiated by the appropriate parties, whether UOB Nominees, USSB or Equiticorp or even UOB Singapore".

[50] Further the Court of Appeal then was mindful too in para. 100 of its grounds that certain observations were made without the benefit of certain parties before them especially UOB Singapore.

[51] There was also never an issue as to the *forum conveniens* of the dispute.

Position Of The Other Defendants/Respondents

[52] All the defendants did not have any objection to the stay application other than Equiticorp. In this appeal too, the CCSB liquidators take a neutral position while USSB's receiver supports it. Equiticorp's application to intervene in the USSB suit was allowed by the HCJ and on appeal to this court, was allowed, such that it no longer remains a party. Equiticorp has filed an application for leave to the Federal Court.

[53] It bears reminding that Equiticorp was then an unsecured creditor of CCSB and it is not disputed the debts have been fully paid by the CCSB liquidators.

[54] Hence all defendants in the USSB suit cannot be said to be prejudiced by not being made parties to the Singapore OS.

[55] The disputes in the Singapore OS and the USSB suit only concern USSB and UOB and not the other defendants in the USSB suit as they are not parties to the loan agreement and the debenture. Hence, the stay cannot possibly prejudice them, more so due to the position taken by them, as stated earlier.

Effect Of The Singapore OS

[56] Even if the Singapore OS cannot be enforced in Malaysia due to it being a non-monetary judgment, it cannot negate the fact that the Singapore judgment can be recognised by the courts here due to the exclusive jurisdiction clause. This is particularly so where what is being sought in the OS are the same as that in USSB suit. To recap, cl. 25.2(c) of the loan agreement provides USSB's agreement that a final judgment of the Singapore court shall be conclusive and binding upon it and shall be conclusive evidence of the fact and of the amount of USSB's indebtedness.

Conclusion

[57] For the above reasons, we found merits in the appeal and allowed the stay of proceedings.